ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOSEPHINE LINKER HART, JUDGE

DIVISION II

CA07-524

February 6, 2008

WAVERLY-ARKANSAS, INC. d/b/a MENA MANOR, HCM, INC., and TERESA LUNSFORD APPELLANTS	AN APPEAL FROM POLK COUNTY CIRCUIT COURT [No. CV-05-94]
v.	
PEGGY KEENER, As Personal Representative of the ESTATE OF ALPHA G. DAVIS, Deceased APPELLEE	HONORABLE JERRY WAYNE LOONEY, CIRCUIT JUDGE AFFIRMED

This is an appeal from a circuit court's denial of a motion to compel arbitration. Appellee Peggy Keener, as personal representative of the estate of her mother, Alpha Davis, and on behalf of Ms. Davis's wrongful-death beneficiaries, brought this medical-malpractice action against appellants, Waverly-Arkansas, Inc., d/b/a Mena Manor (a nursing home); HCM, Inc.; and Teresa Lunsford, in her capacity as administrator of Mena Manor. The trial court denied the motion to compel arbitration on the ground that Ms. Keener's signature, as the holder of her mother's power of attorney, on the arbitration agreement was invalid. It also ruled that the arbitration agreement was a contract of adhesion and that the circumstances

surrounding its execution rendered it unconscionable. We find no error in the circuit court's decision and affirm.

In late 1996, Ms. Davis had a stroke that paralyzed her right side and made her unable to speak.[1] After she declined appellee's request to sign a general power of attorney on February 1, 1997, appellee's daughter placed a pen in her grandmother's hand and held it as Ms. Davis (supposedly) signed the power of attorney. Appellee did not know whether her mother understood what she had asked her to do or whether she had actually moved the pen. Appellee's brother had the power of attorney notarized by someone who was not there when the document was signed.

Appellee used the power of attorney to receive her mother's social security benefits, pay her bills, and, in 1997, admit her to Mena Manor. The arbitration agreement in dispute was not part of the initial admissions documents that appellee signed. She signed it five years later, when Ms. Lunsford asked her to come to the nursing home to sign a revised agreement. In her May 16, 2002 letter to the residents and their legal representatives, Ms. Lunsford did not mention an arbitration agreement or whether consent was optional:

> At Mena Manor we continue to find ways to improve our services and to maintain the quality of care provided to you. As part of our ongoing quality improvement and compliance activities, we have reviewed our standard admission agreement that you signed when you first became a resident of Mena. As a result of

[1]Ms. Davis was eighty-one years old and suffered from several serious medical conditions when she signed the power of attorney. In addition to paralyzing her right side and making her unable to speak, the stroke left her nearly unable to communicate at all. She could not consistently follow commands, and appellee was unsure whether her mother understood language. Ms. Davis's medical records indicated that she also suffered from coronary artery disease, hypertension, chronic obstructive pulmonary disease, spinal stenosis, cataracts, and chronic lymphocytic leukemia. She had suffered a hip fracture in the past.

> our review, we revised the agreement to give you more information about the care and services you receive here and make it easier for you to understand. The new agreement includes additional, specific information about your rights as a resident in our nursing home and more detailed information about the costs of your case. There are no rate increases or other changes in the services you receive here.
>
> Please contact Melinda Davis, Bookkeeper, at 479-394-2617 to set up an appointment to review the admission agreements and to answer any questions you have with the agreement or your care and services here. We appreciate your time and hope to have all new admission agreements signed by all of our residents no later than May 30, 2002.

According to appellants, Maria Parker, a registered nurse at Mena Manor, discussed the arbitration agreement with appellee before she signed it on May 22, 2002, and informed her that she had no obligation to sign it. Appellee, however, takes the position that the document was not explained to her before she signed it and that, even if she had read it (which she had not), she would not have understood that she was waiving a right to jury trial. She denies having been told that she was signing an arbitration agreement and states that she had assumed that the document dealt with such things as nursing-home residents' rights.

The arbitration agreement, which appellee signed as the "authorized representative" of her mother, was broadly worded and purported to cover all "claims, disputes, and controversies arising out of, or in connection with or relating in any way to the . . . Admission Agreement, . . . or claims based on . . . contract, tort, statute, . . . negligence . . . to the fullest extent permitted by federal law. . . ." The contract provided that the arbitration would be administered by the American Health Lawyers Association (AHLA) under its Alternative Dispute Resolution Service Rules of Procedure for Arbitration; that all challenges to its validity would be determined by the arbitrator; and that the Federal Arbitration Act

would apply. It set out a two-year statute of limitations and stated that it would not prevent any party from filing a grievance pursuant to federal or state law. It concluded:

> This provision is an election to resolve Claims by arbitration rather than the judicial process. The parties understand that the rules applicable to arbitrations and the rights of parties in arbitration differ from the rules and rights applicable in court. IT IS UNDERSTOOD THAT THE PARTIES WAIVE ANY RIGHT TO A JURY TRIAL, A TRIAL IN COURT, OR AN APPEAL FROM A DECISION OR AWARD OF DAMAGES.
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> The undersigned certifies that he/she has read this provision and that it has been fully explained to him/her, that he/she understands its contents, and has received a copy of the provision and that he/she is the Resident, or a person duly-authorized by the Resident or otherwise to execute this provision and accept its terms.

Ms. Davis died on August 23, 2003. In 2005, appellee brought this wrongful-death and survival action against appellants, claiming that their negligence had caused her mother's death and had violated her mother's rights under the Arkansas Residents' Rights Act, Ark. Code Ann. §§ 20-10-1201 through 20-10-1209 (Repl. 2005). Appellants moved to compel arbitration. In response, appellee argued that the arbitration provision was unenforceable; that it violated the residents'-rights statute; that there was no knowing and voluntary waiver of Ms. Davis's rights; that appellee had no legal authority to bind her mother to the arbitration provision; and that the arbitration agreement was unconscionable. In their reply, appellants argued that appellee's unclean hands barred her from arguing that she did not have authority to execute the agreement. They filed copies of appellee's and Ms. Parker's depositions.

After a hearing on the motion to compel arbitration, the court entered an order denying the motion. The trial court stated that it was concerned about appellee's using the

power of attorney to conduct business for her mother for several years and then disavowing that authority with regard to the issue of arbitration. Nevertheless, the court stated, the overriding question was the validity of the document itself, which it found to be invalid. The court stated: "The uncontroverted evidence suggests that Ms. Davis was incompetent to sign such [a] document and would have refused to do so had she been competent at the time." The court also stated that the arbitration agreement was a contract of adhesion:

> There was no opportunity to bargain, the "consumer" was in an unequal bargaining position and the opportunity to obtain the services otherwise were limited. What is more, the totality of the circumstance[s] surrounding the negotiation (or lack thereof) and execution of the agreement suggests this particular provision is unconscionable. The aggrieved party (Ms. Davis) was not made aware of nor could comprehend the provision. Her "representative" (Ms. Keener), even had she been acting under a valid Power of Attorney, was not made aware that she was signing away significant rights on behalf of her mother. The discussion of the issues of adhesion and unconscionability in the Declaratory Order from *In the Matter of Northport Health Services, Inc.* seem[s] particularly persuasive and applicable here.[2]

Appellants then filed this appeal. An order denying a motion to compel arbitration is an immediately appealable order. *Pest Mgmt., Inc. v. Langer*, 369 Ark. 52, ___ S.W.3d ___ (2007). We review a circuit court's order denying a motion to compel arbitration de novo on the record. *Sterne, Agee & Leach, Inc. v. Way*, ___ Ark. App. ___, ___ S.W.3d ___ (Dec. 19, 2007).

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[2]*In the Matter of Northport Health Services, Inc.*, is a June 18, 2002, declaratory order of the Arkansas Department of Human Services, Office of Long-Term Care, concerning arbitration agreements in the nursing-home context. In this order, the OLTC declared that an arbitration agreement that a nursing home sought to enforce was not valid and that it violated residents' rights. This lengthy order set out the reasons why such agreements are not favored in cases involving patients' claims against nursing homes and must be carefully scrutinized.

On appeal, appellants emphasize the strong national policy favoring the enforcement of arbitration agreements. *See Sterne, Agee & Leach, Inc. v. Way*, *supra*. These principles, however, have no application here because a valid contract to arbitrate did not exist. In cases like this, a threshold inquiry is whether an agreement to arbitrate exists. *Alltel Corp. v. Sumner*, 360 Ark. 573, 203 S.W.3d 77 (2005). This analysis is made under state law, even when the Federal Arbitration Act governs the agreement. *The Money Place, LLC v. Barnes*, 349 Ark. 411, 78 S.W.3d 714 (2002).

Appellants argue that appellee's "unclean hands" should preclude her from disavowing the arbitration agreement. The clean-hands maxim bars relief to those guilty of improper conduct in the matter as to which they seek relief. *Merchants & Planters Bank & Trust Co. v. Massey,* 302 Ark. 421, 790 S.W.2d 889 (1990). The doctrine of unclean hands has traditionally not been used to punish the complainant nor to favor the defendant but has been applied in the interest of the public and to protect the court and defendant by not allowing the complainant to use the court's powers to bring about an inequitable result. *Estate of Houston v. Houston*, 31 Ark. App. 218, 792 S.W.2d 342 (1990). In determining whether the clean-hands doctrine should be applied, the equities must be weighed. *Id.* It is within the trial court's discretion as to whether the interests of equity and justice require application of the doctrine. *Lucas v. Grant,* 61 Ark. App. 29, 962 S.W.2d 388 (1998).

Appellants correctly point out that a plaintiff cannot simultaneously claim the benefits of a contract and repudiate its burdens and conditions. *American Ins. Co. v. Cazort*, 316 Ark. 314, 871 S.W.2d 575 (1994). Even a party who has not signed an arbitration agreement can

be compelled to arbitrate her claims, pursuant to contract and agency principles. *See Letizia v. Prudential Bache Sec., Inc.*, 802 F.2d 1185 (9th Cir. 1986). A non-signatory can be estopped from refusing to comply with an arbitration clause if she has received a direct benefit from the contract. *International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411 (4th Cir. 2000). However, appellee's actions — on which appellants base this argument — were made in her individual capacity, not as Ms. Davis's personal representative. Thus, her behavior could not estop Ms. Davis's estate or the wrongful-death beneficiaries, whom she now represents. *See Davenport v. Lee*, 348 Ark. 148, 72 S.W.3d 85 (2002); *Ramirez v. White County Circuit Court*, 343 Ark. 372, 38 S.W.3d 298 (2001). The estate and the wrongful-death beneficiaries would be bound only to the extent that Ms. Davis was bound. *See Grenada Living Ctr., LLC v. Coleman*, 961 So. 2d 33 (Miss. 2007). There is no evidence that Ms. Davis intended to give her power of attorney to appellee or that she was capable of doing so. It is also clear that Ms. Davis did not give express authority to appellee to sign the arbitration agreement. The trial court did not abuse its discretion in refusing to apply the doctrine.

Appellants contend that appellee's authority to bind Ms. Davis to the arbitration agreement was not dependent on the power of attorney because she had implied or apparent authority to act as Ms. Davis's agent. We find no merit to this argument. The relation of agency is created as the result of conduct by two parties manifesting that one of them is willing for the other to act for her subject to her control and that the other consents to so act. *Sterne, Agee & Leach, Inc. v. Way*, *supra*. Neither agency nor the extent of an agent's

authority can be shown by her own declarations in the absence of the party to be affected. *Dixie Ins. Co. v. Joe Works Chevrolet, Inc.*, 298 Ark. 106, 766 S.W.2d 4 (1989). Apparent authority in an agent is such authority as the principal knowingly permits the agent to assume or which she holds the agent out as possessing; such authority as she appears to have by reason of the actual authority that she has or such authority as a reasonably prudent man, using diligence and discretion, in view of the principal's conduct, would naturally suppose the agent to possess. *Sterne, Agee & Leach, Inc. v. Way*, *supra*. The record is utterly devoid of any evidence suggesting such holding out by Ms. Davis.

Appellants further argue that Ark. Code Ann. § 20-9-602(11) (Repl. 2005) gave appellee authority to bind her mother to the arbitration agreement. This argument was not raised or ruled on below. We need not consider arguments raised for the first time on appeal. *Baptist Health v. Murphy*, 365 Ark. 115, 226 S.W.3d 800 (2006). We do not address issues on which an appellant fails to obtain a ruling. *Israel v. Oskey*, 92 Ark. App. 192, 212 S.W.3d 45 (2005).

Because we affirm the trial court's finding that appellee lacked any authority to bind her mother to the arbitration agreement, we need not address appellants' assertion that the arbitration agreement was not an unconscionable contract of adhesion.

Affirmed.

HEFFLEY and MILLER, JJ., agree.